Supreme Court, U.S.
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No. 04-481

In The

Supreme Court of the United States

IKECHUKWU MACDONALD ENEWALLY,
UZOAMAKA B. ENEWALLY,

Petitioners,

vs.

WASHINGTON MUTUAL BANK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS G. KEMERER, ESQ.
LAW OFFICES OF
THOMAS G. KEMERER
5305 E. 2nd St., Suite 203
Long Beach, CA 90803-5340
Tel.: (562) 987-0683
Fax.: (562) 987-5374

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a Chapter 13 Debtor in bankruptcy who modifies a non-principal residence mortgage loan under 11 U.S.C. §§ 506(a), 1322(b)(2) by bifurcating such debt into secured and unsecured elements may also continue to tender regular installments of principal and interest pursuant to the "cure and maintain" provisions of 11 U.S.C. § 1322(b)(5) and thereby extend payments on the secured balance of mortgage debt beyond the three to five year limitation of 11 U.S.C. § 1322(d).

2. Whether all mortgage loans modified under 11 U.S.C. §§ 506(a), 1322(b)(2) must be paid in full within the three to five year limitation of 11 U.S.C. § 1322(d) notwithstanding the "cure and maintain" provisions of 11 U.S.C. § 1322(b)(5).

LIST OF PARTIES

All parties are listed in the caption.

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STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its Opinion on May 27, 2004 (App. 1). On June 7, 2004, Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing *en banc* in the Court of Appeals. On July 1, 2004, the Court of Appeals filed its order denying the Petition for Rehearing (App. 50) and then issued an order staying the mandate on July 8, 2004.

Petitioner seeks review of the Ninth Circuit's Opinion on a writ of certiorari from this Court. The present petition is timely filed under 28 U.S.C. § 2101(c) and Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of a federal court of appeals on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 506(a)

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553, of

this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Title 11 United States Code, Section 1322(b)(2)

Subject to subsections (a) and (c) of this section, the plan may – (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

Title 11 United States Code, Section 1322(b)(5)

Subject to subsections (a) and (c) of this section, the plan may – (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

Title 11 United States Code, Section 1322(d)

The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the

court may not approve a period that is longer than five years.

STATEMENT OF THE CASE

1. In 2000, Petitioners, Ikechukwu and Uzoamaka Enewally ("Enewally"), filed a joint voluntary petition for Chapter 13 bankruptcy and an accompanying Chapter 13 plan. In their schedules, the Enewallys listed a fee interest in three properties: their residence in Norwalk, California, and two rental properties in Long Beach, California.

The property at issue in this case is a rental property located at 3380 Andy Street in Long Beach (the "Andy property"). The Enewallys' bankruptcy schedules stated that the Andy property had a value of $210,000, encumbered by a $245,023 first deed of trust held by Washington Mutual Bank ("WAMU"). Thus, according to the bankruptcy schedules, $35,023 of the Enewallys' debt to WAMU was unsecured.

Under Enewallys' initial and First Amended Chapter 13 plans, WAMU was to receive regular monthly payments pursuant to the loan terms. Prior to confirmation of their amended Chapter 13 Plan, Enewally filed an adversary complaint against WAMU seeking a judgment valuing the Andy property at $210,000 and to bifurcate the loan into secured and unsecured claims pursuant to 11 U.S.C. §§ 506(a), 1322(b)(2).

In the adversary proceeding, Enewally proposed to maintain the contractual monthly payments to WAMU on the reduced secured balance with interest as provided for

by the underlying loan, while disposing of the unsecured balance through their Chapter 13 plan.

Enewally then filed a motion for summary judgment in the adversary proceeding, which the bankruptcy court granted. The judgment as entered values the Andy property at $210,000 and bifurcates the WAMU debt into its secured and unsecured portions based thereon (App. 44).

In an accompanying Opinion, the Bankruptcy Court held that the Enewallys' proposal to maintain regular monthly mortgage payments on the secured portion of the debt was permissible under 11 U.S.C. § 1322(b)(5) because, as modified, the regular monthly payments would retire the secured debt in approximately 18 years (App. 38-40).

On appeal, the District Court reversed; holding that loan modifications under 11 U.S.C. §§ 506(a), 1322(b)(2) could not be coupled with the "cure and maintain" procedures of 11 U.S.C. § 1322(b)(5) (App. 17). The Ninth Circuit Court of Appeals agreed and affirmed the District Court's reversal (App. 1).

2. Original jurisdiction for cases under Title 11 lies in the Bankruptcy Courts under 11 U.S.C. § 1334.

The Bankruptcy Court's Judgment was entered on April 19, 2002 (App. 43), and WAMU timely appealed to the District Court. The Bankruptcy Court's Judgment was a final determination of rights in that action which was appealable to the United States District Court under 28 U.S.C. § 158(a)(1), Bankruptcy Rule 8001(a).

The District Court had jurisdiction to hear an appeal from the Bankruptcy Court under 28 U.S.C. § 158(a). The

District Court's Ruling on Appeal was entered on November 26, 2002 and Enewally timely appealed to the Ninth Circuit Court of Appeals. WAMU cross-appealed.

The Ninth Circuit Court of Appeals had jurisdiction to hear the appeal from the District Court under 28 U.S.C. §§ 158(d), 1291. The Ninth Circuit Court of Appeals then issued its Opinion on May 27, 2004 (App. 1).

Petitioners timely filed their Petition for Rehearing with a Suggestion for Rehearing En Banc on June 7, 2004. On July 1, 2004, the Ninth Circuit panel denied the Petition for Rehearing (App. 50) and subsequently granted Petitioners' Application to Stay the Mandate on July 8, 2004.

REASONS FOR ALLOWANCE OF THE WRIT

In this case, the Ninth Circuit Court of Appeals has created a hard line rule that every mortgage loan modified under 11 U.S.C. §§ 506(a), 1322(b)(2) must be paid in full within the three to five year term of a Chapter 13 Plan.

This is in stark degradation of the "cure and maintain" provisions of 11 U.S.C. § 1322(b)(5) and is a clearly erroneous interpretation of Title 11 which conflicts with cases from other Circuits.

If the Ninth Circuit's holding is left undisturbed, Chapter 13 debtors across the land will henceforth be required to choose between paying their entire mortgage debt over the three to five year term of a Chapter 13 Plan or foregoing Chapter 13 "lien-stripping" altogether. The Ninth Circuit's holding therefore substantially restricts the Chapter 13 debtors options under 11 U.S.C. § 1322(b).

This Ninth Circuit's holding should therefore be reviewed here as it creates a conflict amongst the Circuits and because the issues involved are important questions of federal law that have not been, but should be, settled by this Court.

I. REVIEW IS WARRANTED TO RESOLVE AN IMPORTANT ISSUE OF FEDERAL LAW

A. Chapter 13 "lien-stripping"

Chapter 13 "lien-stripping" results from the complimentary provisions of 11 U.S.C. §§ 506(a), 1322(b)(2).

Section 506(a) provides that "[A]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

In other words, § 506(a) separates an undersecured creditor's claim into two parts: a secured claim to the extent of the value of the collateral and an unsecured claim for the balance. S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) p. 68.

Section 1322(b)(2) then provides that a Chapter 13 Plan may ". . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . ."

Therefore, in a case such as this, a Chapter 13 debtor in bankruptcy may "strip off" a non-residential mortgage

loan to the extent that the loan balance exceeds the value of the collateral property with such claim thereafter being treated as unsecured.

While Petitioners right to modify the WAMU loan has not been disputed, the point of controversy has been treatment of the modified claim.

B. Treatment of the modified secured claim

Petitioners have modified their non-principal residence mortgage loan by reducing its secured balance to the value of the collateral property per 11 U.S.C. §§ 506(a), 1322(b)(2) while leaving the contractual monthly payment and interest rate intact and propose to maintain regular monthly mortgage payments pursuant to the original loan terms per 11 U.S.C. § 1322(b)(5).

On their part, WAMU slavishly insists that any loan so modified must be paid in full within the three to five year limitation of 11 U.S.C. § 1322(d) and that 11 U.S.C. § 1322(b)(5) somehow evaporates when a Chapter 13 debtor invokes the "lien-stripping" procedures.

The Ninth Circuit agreed with WAMU's position without addressing Petitioner's fundamental argument that the code itself does not prohibit a loan modification followed by a "cure and maintain" under 11 U.S.C. § 1322(b)(5).

The Ninth Circuit's holding also conflicts with *In re McGregor*, 172 B.R. 718 (Bankr. D. Mass. 1994), *In re Pruett*, 178 B.R. 7 (Bankr. N.D. Ala. 1995), and *In re Hussain*, 250 B.R. 502 (Bankr. N.J. 2000); in which the Courts distinguished between loan modifications which effect the installments of principal and/or interest and

those which do not. These cases all endorse Petitioners loan treatment here, which leaves the contractual monthly payment and interest rate intact with payments on the reduced secured balance to exceed five years under the "maintain" language of 11 U.S.C. § 1322(b)(5).

See *In re McGregor*, supra at 721 "[T]he Debtor may nevertheless take advantage of § 1322(b)(5) by keeping the same 10.5% contract rate [of interest] and making the same payments of principal and interest called for by the note during the life of the plan and during such further period of time as is necessary to have the total principal payments equal the amount of the secured claim as valued by this Court. There would then be 'maintenance of payments' and those payments would be maintained on the 'secured claim' as that claim is computed in accordance with section 506(a). The three to five year limitation on plan payments of [former] section 1322(c) would then have no application because section 1322(b)(5) permits payments lasting longer than five years."; *In re Pruett*, supra at 9 [same analysis].

Despite the above cases, the Ninth Circuit panel rejected them in favor of a much narrower, and clearly erroneous, interpretation of the Bankruptcy Code.

C. The Ninth Circuit's analysis

With this case, the Ninth Circuit has established a bright-line rule that loan modifications under 11 U.S.C. §§ 506(a), 1322(b)(2) can never be coupled with the "cure and maintain" provisions of 11 U.S.C. § 1322(b)(5).

The Ninth Circuit based this result on *Dewsnup v. Timm*, 502 U.S. 410 (1992) in which this Court

"[C]autioned against courts fashioning a 'broad new remedy' under § 506(a) where the remedy was not 'mentioned somewhere in the Code itself or in the annals of Congress' [Citation]." [App. 11-12].

Somehow, the Ninth Circuit failed to see that the Petitioners' proposed loan treatment is indeed "mentioned somewhere in the Code" as it is the plain text of 11 U.S.C. § 1322(b)(5) itself.

Rather than adhere to the plain language of the statute, the Ninth Circuit found that "In order to hold that the debtor's lien stripping proposal is viable under the "cure and maintain" provision of § 1322(b)(5), we would have to hold that § 506(a) coupled with § 1322(b)(5) provides a new remedy allowing modification of secured debts in Chapter 13 independent of § 1322(b)(2)." [App. 12].

If this were in fact the "debtor's lien stripping proposal", the Ninth Circuit would have correctly disapproved. But that is not the Petitioners' proposal. Instead, Petitioners have always said that they could modify the mortgage loan under 11 U.S.C. §§ 506(a), 1322(b)(2) and thereafter invoke the "cure and maintain" provisions of 11 U.S.C. § 1322(b)(5).

Petitioners' proposed loan treatment is true to both the Bankruptcy Code and the cases cited by the Ninth Circuit panel for its contra result.

Beginning with the code itself, 11 U.S.C. § 1322(b) is written conjunctively with the result that any one or all of its subsections may be invoked by the Chapter 13 debtor.

This Court has warned against statutory interpretations which fail to give effect to all parts of the statute. See, *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187

(1993), "We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid 'deny[ing] effect to a part of a statute,' we accord 'significance and effect . . . to every word.' [Citation.]"

11 U.S.C. § 1322(b)(2) and § 1322(b)(5) should therefore be read in harmony as there is nothing in the Bankruptcy Code, published cases or legislative history to suggest that they are mutually exclusive. The Ninth Circuit's holding is indefensible as a matter of statutory interpretation as it effectively abolishes 11 U.S.C. § 1322(b)(5) upon the occurrence of a 11 U.S.C. §§ 506(a), 1322(b)(2) loan modification.

As to case law, the Ninth Circuit panel cites to *In re Scott*, 121 B.R. 605 (Bankr. E.D. Okla. 1990) as support for their disjunctive reading of 11 U.S.C. § 1322(b) [App. 10]. Their reliance is misplaced as *Scott* was a trial court Memorandum of Facts and Conclusion of Law relating to a motion for relief from stay which is notably sparse on facts. Significantly, the case is silent on the determinative factor of whether the debtor was attempting to modify the amount of his regular monthly mortgage payments or whether he was proposing to leave such payment amounts intact. *Id.* at 608-09.

Per *McGregor* and *Pruett*, supra, if the modification sought to reach the monthly mortgage payment amount or interest rate it would have to be treated through the Plan but if it left those items intact there could be a "cure and maintain" under 11 U.S.C. § 1322(b)(5). Because the *Scott* opinion is silent on this decisive issue, the Ninth Circuit panel's reliance thereon is misplaced.

The Ninth Circuit panel also cites *In re Hussain*, 250 B.R. 502 (Bankr. N.J. 2000) as further support for their

disjunctive reading of § 1322(b) [App. 10]. Ironically, *Hussain* supports Petitioners' position rather than the result reached by the Ninth Circuit.

In *Hussain*, the debtor sought to modify both the secured claim amount and the underlying interest rate and to thereafter extend these modified monthly payments beyond the three to five year Plan term. *Id.* at 508.

The *Hussain* Court properly rejected that approach consistent with *McGregor* and *Pruett*, supra, while also opining that a § 1322(b)(2) modification could be coupled with a "cure and maintain" so long as the interest rate and contractual monthly payment remained the same. "[I]f a chapter 13 debtor chooses to employ the Code's "cure and maintenance" provision, the three to five year limitation on plan payments of § 1322(d) has no application because § 1322(b)(5) specifically permits payments on a secured claim beyond the final payment under the plan." *Id.* at 510.

The Ninth Circuit's holding therefore finds no support in the code nor the cases cited by it.

On the other hand, Petitioners' interpretation of the Bankruptcy Code to the effect that a Chapter 13 debtor invoking the loan modification procedures of 11 U.S.C. §§ 506(a), 1322(b)(2) may also avail themselves of the "cure and maintain" provisions of 11 U.S.C. § 1322(b)(5) so long as they leave the contractual payment amount and interest rate intact is endorsed by *McGregor*, *Pruett*, and *Hussain* and is consistent with both the word and the spirit of the bankruptcy code itself.

CONCLUSION

This case should be reviewed here because it will have a far reaching effect on Chapter 13 debtors across the land as it is the first published case from a Federal Court of Appeals to address whether the secured balance under a modified mortgage loan may be maintained pursuant to the original loan terms.

Having answered that question in the negative, the Ninth Circuit's holding substantially restricts the Chapter 13 debtor's ability to effectively and fully reorganize under the Code based on an entirely erroneous interpretation of the bankruptcy code.

Review should therefore be granted because this case creates a conflict amongst the Circuits and presents an important issue of Federal law not yet considered by this Court but one which should be resolved here so that Chapter 13 debtor's across the land can have uniform and consistent guidelines when it comes to the Chapter 13 lien-stripping procedure.

Respectfully submitted,

THOMAS G. KEMERER, ESQ.
LAW OFFICES OF
THOMAS G. KEMERER
5305 E. 2nd St., Suite 203
Long Beach, CA 90803-5340
Tel.: (562) 987-0683
Fax.: (562) 987-5374

Attorney for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: IKECHUKWU MACDONALD ENEWALLY; In re: UZOAMAKA B. ENEWALLY, *Debtors.* IKECHUKWU MACDONALD ENEWALLY; UZOMAKA B. ENEWALLY, *Appellants,* v. WASHINGTON MUTUAL BANK, *Appellee.*	No. 02-57119 D.C. No. CV-02-00459-GLT
In re: UZOAMAKA B. ENEWALLY; *Debtor.* WASHINGTON MUTUAL BANK, *Petitioner-Appellant,* IKECHUKWU MACDONALD ENEWALLY, *Respondent-Appellee,* v. UZOMAKA B. ENEWALLY, *Respondent-Appellee,* IKECHUKWU MACDONALD ENEWALLY, *Debtor.*	No. 02-57151 D.C. No. CV-02-00459-GLT OPINION

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
February 2, 2004 – Pasadena, California

Filed May 27, 2004

Before: William C. Canby, Jr., Pamela Ann Rymer,
and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

COUNSEL

Thomas G. Kemerer, Law Offices of Stephen M. Taylor, Long Beach, California, for the appellants/cross-appellees.

Alan S. Wolf, The Wolf Firm, Newport Beach, California, for the appellee/cross-appellant.

OPINION

THOMAS, Circuit Judge:

In this appeal, we consider whether a Chapter 13 bankruptcy plan may provide for dividing a loan into secured and unsecured claims, commonly referred to as "lien stripping," with the debtor satisfying the secured claim beyond the life of the Chapter 13 plan. We conclude that this type of plan is not permitted under Chapter 13 of the Bankruptcy Code, and we affirm the judgment of the district court.

I

In 2000, Ikechukwu and Uzoamaka Enewally filed a joint voluntary petition for Chapter 13 bankruptcy and an accompanying Chapter 13 plan. In their schedules, the Enewallys listed a fee interest in three properties: their residence in Norwalk, California, and two rental properties in Long Beach, California. The property at issue in this case is located at 3380 Andy Street in Long Beach ("the Andy property"). The Enewallys' bankruptcy schedules stated that the Andy property had a value of $210,000, encumbered by a $245,023 first deed of trust held by Washington Mutual Bank ("Bank"). Thus, according to the bankruptcy schedules, $35,023 of the Enewallys' debt to the Bank was unsecured.

Under the debtors' initial and First Amended Chapter 13 plans, the Bank was to receive regular payments pursuant to the loan terms. Prior to confirmation of their amended Chapter 13 Plan, the debtors filed an adversary complaint against the Bank seeking a judgment valuing the Andy property at $210,000. The complaint also sought to bifurcate the loan into secured and unsecured claims pursuant to 11 U.S.C. §§ 506(a), 1322(b)(2), with $30,744.33 of the Bank's debt deemed unsecured. Before entering judgment on the adversary complaint, the bankruptcy court confirmed the amended plan.

In the adversary proceeding, the debtors sought to maintain the contractual monthly payments on the reduced secured balance with interest, while disposing of the unsecured balance through their confirmed Chapter 13 plan. To achieve that end, the debtors filed a motion to modify the confirmed plan. The motion sought to insert a

provision advising creditors of the proposed loan modifications asserted in the adversary proceeding. The motion also explicitly noted that no financial changes to the confirmed plan were desired. The bankruptcy court granted the Enewallys' motion to modify their Chapter 13 plan on the condition that they prevailed in the adversary proceeding.

The debtors filed a motion for summary judgment in the adversary proceeding, supported by an affidavit signed by Ikechukwu Enewally expressing his opinion that the fair market value of the Andy property was $210,000. No other evidence was tendered to the bankruptcy court on valuation by any party.

After holding three hearings, the bankruptcy court granted summary judgment to the debtors. The bankruptcy court valued the Andy property at $210,000 because it was "the stipulated value of the property." The court required the debtors to make monthly payments on the $210,000 secured portion of the loan, pursuant to the original loan terms, and to pay 17% of the unsecured claim throughout the life of the plan, the remainder to be discharged upon successful completion of the Chapter 13 plan. Final judgment was entered, and the Bank timely appealed to the district court. The district court reversed the determination that the debtors could repay the bifurcated loan over a term in excess of five years, holding that the bankruptcy court's opinion was inconsistent with *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993). The district court affirmed the bankruptcy court's valuation of the Andy property at $210,000, based on the undisputed valuation affidavit. The debtors timely appealed the judgment of the district court, and the Bank timely cross-appealed.

II

The Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), Pub.L. No. 95-598, 92 Stat. 2549 (1978), effected important changes in the treatment of secured creditors in bankruptcy proceedings. One of the most significant changes, codified in 11 U.S.C. § 506, describes how secured status is to be determined. This section effectively "abolishes the use of the terms 'secured creditor' and 'unsecured creditor' and substitutes in their places the terms 'secured claim' and 'unsecured claim.'" H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 356 (1977) *reprinted in* 1978 U.S.C.C.A.N. 6312.[1] Under the Bankruptcy

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[1] The full text of 11 U.S.C. § 506 is as follows:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(Continued on following page)

Code, a secured loan may be separated into two distinct claims: a secured claim for an amount equal to the value of the security, and an unsecured claim for the difference, if any, between the amount of the loan and the value of the security.[2] 11 U.S.C. § 506. As the Supreme Court explained in *Dewsnup v. Timm*, 502 U.S. 410, 414-15 (1992), one possible interpretation is that:

> under § 506(a), a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed, a debtor can void a lien on the property pursuant to § 506(d) to the extent the claim is no longer secured and thus is not "an allowed secured claim." In other words, § 506(a) bifurcates classes of claims allowed under § 502 into secured claims and unsecured claims; any portion of an allowed claim deemed to be unsecured under § 506(a) is not an

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(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

[2] One of the theories underlying the treatment of secured claims in bankruptcy is that "[t]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982) (citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)). Thus, in various ways, the Bankruptcy Code protects secured claims and treats them differently from unsecured claims. *See, e.g.*, 11 U.S.C. § 361 (providing for adequate protection of property); 11 U.S.C. § 1129(b)(2)(A) (providing for a secured creditor in a Chapter 11 reorganization to receive the present value of its allowed secured claim).

> "allowed secured claim" within the lien-voiding scope of § 506(d).

Indeed, a number of courts have acknowledged that the plain language of § 506(d) indicates that an undersecured lien is void to the extent that it exceeds the value of the collateral. *See, e.g., Crain v. PSB Lending Corp. (In re Crain),* 243 B.R. 75, 77-78 (Bankr. C.D. Cal. 1999). However, the Supreme Court in *Dewsnup* held that a lien was not void to the extent that the loan was undersecured, but rather the lien securing the entire amount of the loan survived a Chapter 7 bankruptcy undisturbed. The Court explained stating:

> Therefore, we hold that § 506(d) does not allow petitioner to "strip down" respondents' lien, because respondents' claim is secured by a lien and has been fully allowed pursuant to § 502.

502 U.S. at 417.

Thus, after *Dewsnup,* courts have refused to allow lien stripping in Chapter 7 cases. *See, e.g., Talbert v. City Mortgage Servs. (In re Talbert),* 344 F.3d 555, 557-62 (6th Cir. 2003); *Ryan v. Homecomings Fin. Network,* 253 F.3d 778, 783 (4th Cir. 2001); 4 *Collier on Bankruptcy* ¶ 506.06[1][b] at 506-150 (Lawrence P. King et al. eds., 15th ed. 2003). However, the extent to which lien stripping would be allowed under other chapters of the Bankruptcy Code remained an open question after *Dewsnup,* as the Fifth Circuit explained:

> The rationales advanced in the Dewsnup opinion for prohibiting lien stripping in Chapter 7 bankruptcies, however, have little relevance in the context of rehabilitative bankruptcy proceedings under Chapters 11, 12, and 13, where

> lien stripping is expressly and broadly permitted, subject only to very minor qualifications. The legislative history of the Code makes clear that lien stripping is permitted in the reorganization chapters.

Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.3d 277, 291 n.21 (5th Cir. 2000) (quoting Jane Kaufman Winn, *Lien Stripping After Nobelman,* 27 LOY. L.A. L. REV. 541, 554-55 (1994)).

Lien stripping can occur in a number of different ways under the Bankruptcy Code; thus, each circumstance must be separately examined in its own statutory context. For example, following *Dewsnup,* a number of Circuit Courts – including ours – reaffirmed the use of lien stripping in residential loans in Chapter 13 cases. *See Bellamy v. Federal Home Loan Mortgage Corp. (In re Bellamy),* 962 F.2d 176, 180 (2d Cir. 1992); *Lomas Mortgage USA v. Wiese,* 980 F.2d 1279, 1282 (9th Cir. 1992). However, the Supreme Court rejected this approach in *Nobelman v. Am. Sav. Bank,* 508 U.S. 324 (1993), holding that "§ 1322(b)(2) prohibits a Chapter 13 debtor from relying on § 506(a) to reduce an undersecured homestead mortgage to the fair market value of the mortgaged residence."[3] *Id.* at 325-26.

This appeal requires us to consider the question in a slightly different context from the one at issue in *Nobelman.* Specifically, the question in this case is whether a Chapter 13 debtor may bifurcate a non-residential secured

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[3] 11 U.S.C. § 1322(b)(2) provides that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."

real estate loan under § 506(a), but maintain payments on the claim pursuant to § 1322(b)(5) beyond the life of a Chapter 13 plan as circumscribed by § 1322(d).[4] In a very thorough and scholarly opinion, the bankruptcy court in this case concluded that the Bankruptcy Code allowed the debtor to do so. The bankruptcy court explained that:

> A chapter 13 plan may treat a secured debt under two statutory alternatives. First, the plan may modify the rights of a holder of a secured claim pursuant to § 1322(b)(2). Second, the plan may cure any default and maintain payments on the secured claim pursuant to § 1322(b)(5).

As to lien stripping under § 1322(b)(2), the bankruptcy court noted that "the debtors in this case propose to do precisely what the Supreme Court disallowed in *Nobelman* . . . . " However, the bankruptcy court distinguished *Nobelman,* reasoning that, because of the special treatment given by Congress to primary residences, "*Nobelman* applies only where the collateral is exclusively the debtor's principal residence." Thus, the bankruptcy court concluded that the Andy property was "not protected by the anti-modification exception in § 1322(b)(2)."

In analyzing the debtors' proposal to modify the Bank's secured rights while maintaining regular loan payments, the bankruptcy court first observed that such a modification would not be permitted under § 1322(b)(2) because "a secured claim may not be modified under § 1322(b)(2) by reducing the size of the monthly payment

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[4] 11 U.S.C. § 1322(d) provides that: "The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years."

for the duration of the original loan agreement (if the original duration exceeds the length of the plan)." Thus, as the court quite properly observed, "[i]f the chapter 13 debtor proposes to reduce the monthly payments to the secured creditor, the loan must be paid in full over the life of the plan (which may not exceed five years)." *See* 11 U.S.C. § 1322(d).

This requirement necessarily led the bankruptcy court to conclude correctly that "a chapter 13 debtor may not invoke both a modification of a secured creditor's claim under § 1322(b)(2) and the right to 'cure and maintain' over the life of the original loan as authorized under § 1322(b)(5)." *See In re Scott,* 121 B.R. 605, 608-09 (Bankr. E.D. Okla. 1990) (explaining that it is not permissible to modify a secured claim under § 1322(b)(2) while extending payments beyond the plan's term pursuant to § 1322(b)(5)); *see also In re Hussain,* 250 B.R. 502, 507 (Bankr. D.N.J. 2000).

However, because the debtors proposed to continue making the same payments at the original interest rate until the secured debt was paid in full, the bankruptcy court identified another "typical strategy to deal with an undersecured creditor that is not secured by the debtor's principal residence." Namely, the bankruptcy court held that the proposed modification could be made under § 1322(b)(5), with a bifurcation of the secured debt under § 506(a). In other words, the secured debt would first be reduced under § 506(a) to the fair market value of the collateral, then the "cure and maintain" provisions of § 1322(b)(5) would allow the reduced secured debt to be paid over the life of the original note on the original interest terms. A number of bankruptcy courts have endorsed this approach, albeit mostly in dicta. *See, e.g., In*

re McGregor, 172 B.R. 718, 721 (Bankr. D. Mass. 1994); *In re Pruett,* 178 B.R. 7, 8-9 (Bankr. N.D. Ala. 1995).

Applying this reasoning, the bankruptcy court modified the size of the secured claim to the fair market value of $210,000, then allowed the debtors to pay off the secured claim over the term of the original note (which extended beyond the 5 year life of the plan). The unsecured portion of the Bank's note was given the same treatment as the other unsecured creditors under the plan; that is, 17% of the $30,744.33 unsecured claim was to be repaid over the five year plan with the remainder to be discharged upon successful completion of the plan.

On appeal, the district court reversed in a thoughtful order. The district court agreed with the bankruptcy court that a chapter 13 debtor may not invoke both a modification of a secured creditor's claim under § 1322(b)(2) and the right to 'cure and maintain' beyond the life of the Chapter 13 plan as authorized under § 1322(b)(5). The district court also agreed that the debtors' proposal was not viable under § 1322(b)(2). However, the district court disagreed with the bankruptcy court's analysis under § 1322(b)(5). Instead, it held that modification of the loan under § 506(a) and repayment over a term exceeding the length of the plan pursuant to § 1322(b)(5) was not permitted. The district court concluded that *Nobelman* required bifurcation of debt within the context of Chapter 13 and that the five-year term limit imposed by § 1322(d) applied.

Although the bankruptcy court's analysis is arguably much closer to the original vision of the Bankruptcy Code than the district court's holding, we are not writing on a clean slate. The Supreme Court has spoken directly in *Dewsnup* and *Nobelman. Dewsnup* cautioned against

courts fashioning a "broad new remedy" under § 506(a) where the remedy was not "mentioned somewhere in the Code itself or in the annals of Congress." 502 U.S. at 420. In *Nobelman,* the Supreme Court explained that, in a Chapter 13 plan, stripping down an undersecured lien to the value of the underlying collateral pursuant to § 506(a) valuation, "would require a modification of the rights of the holder of the security interest" pursuant to § 1322(b)(2). 508 U.S. at 332. In order to hold that the debtor's lien stripping proposal is viable under the "cure and maintain" provision of § 1322(b)(5), we would have to hold that § 506(a) coupled with § 1322(b)(5) provides a new remedy allowing modification of secured debts in Chapter 13 independent of § 1322(b)(2). The logic of *Dewsnup* and *Nobelman* do not permit this construction. As both the district court and bankruptcy court noted, lien stripping on debts secured by real property that is not the debtor's primary residence is permissible in Chapter 13, even after *Nobelman.* However, it must be accomplished in a manner consistent with § 1322(b)(2). Because § 1322(b)(2) does not allow a modified secured debt to be paid over a period of time longer than the plan term, the debtors' proposed plan modification must be disallowed.

Thus, we agree with the district court that: (1) § 1322(b)(2) by itself does not permit the debtors to repay the secured claim over a period longer than the plan term; (2) a chapter 13 debtor may not invoke both a modification of a secured creditor's claim under § 1322(b)(2) and the right to "cure and maintain" beyond the plan term as authorized under § 1322(b)(5); and (3) a modification of secured debt under Chapter 13 must be accomplished in a manner consistent with § 1322(b)(2). Therefore, a debtor may not use § 506(a) in combination with § 1322(b)(5) to

reduce the secured claim and repay it over a period longer than the plan term.

III

In addition to the question of whether the debtors may strip down their secured debt in Chapter 13 in the manner proposed, the parties raise additional issues that require our decision.

A

The debtors argue that the Bank is precluded from challenging the proposed debt modification by the *res judicata* effect of the confirmed plan. The debtors are correct that "[t]he provisions of a confirmed plan bind the debtor and each creditor . . . whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). Likewise, it is beyond cavil that "[o]nce a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect." *Trulis v. Barton,* 107 F.3d 685, 691 (9th Cir. 1995). Thus, if a creditor fails to timely object to a plan or appeal a confirmation order, "it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code." *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083, 1086 (9th Cir. 1999) (quoting *Andersen v. UNIPACNEBHELP (In re Andersen),* 179 F.3d 1253, 1258 (10th Cir. 1999)). This rule is consistent with the general principle of *res judicata* that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been

raised in that action." *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981).

We have recently observed that in the unique bankruptcy context, "the principle of res judicata should be invoked only after careful inquiry because it blocks unexplored paths that may lead to truth. . . . " *Latman v. Burdette,* ___ F.3d ___, 2004 WL 906293 at *6 (9th Cir. April 29, 2004) (internal quotation marks and citations omitted). Although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor. In other words, if Chapter 13 plan provisions do not adequately identify a secured creditor's modified claims, to hold that the plan modified the claim "would be to allow lien stripping by ambush." *In re Henline,* 242 B.R. 459, 465-66 (Bankr. D. Minn. 1999) (holding that it would violate Fifth Amendment due process guarantee against taking of property to allow a petitioner to strip a lien when the secured creditor was not sufficiently identified as "unsecured" in the plan even though the debt was listed as unsecured in the petition).

Here, during plan confirmation and modification, the bankruptcy court specifically reserved the question at issue because it had been raised via an adversary proceeding. "[I]f an issue must be raised through an adversary proceeding it is not part of the confirmation process and, unless it is actually litigated, confirmation will not have a preclusive effect." *Cen-Pen Corp. v. Hanson,* 58 F.3d 89, 93 (4th Cir. 1995) (quoting *In re Beard,* 112 B.R. 951, 956 (Bankr. N.D. Ind. 1990)). Thus a Chapter 13 plan confirmed while an adversary proceeding was pending would not have *res judicata* effect on the adversary proceeding.

B

The Bank contends that the bankruptcy court's valuation was in error and that the bankruptcy court employed the incorrect date for making the valuation. However, the Bank waived any objection to the bankruptcy court's valuation by failing to contest it before the bankruptcy court. As a general rule, issues "not presented to the trial court cannot generally be raised for the first time on appeal." *United States v. Flores-Payon,* 942 F.2d 556, 558 (9th Cir. 1991). However, we have recognized exceptions to this general rule when (1) there are exceptional circumstances, (2) the new issue arises while the appeal is pending because of a change in the law, or (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue below. Further exception is also made if the trial court's decision was plain error and injustice would otherwise result. *Id.* None of those circumstances exist here. In the absence of contrary evidence, an owner's opinion of property value may be conclusive. *In re Brown,* 244 B.R. 603, 611 (Bankr. W.D. Va. 2000). Thus, since the Bank provided no contrary evidence, the bankruptcy court was well justified in relying on the debtor's affidavit of value. To allow the Bank to contest valuation on appeal would be manifestly unfair and an abuse of the appellate process. As we observed in another, similar bankruptcy appeal, "[f]ederal courts are not run like a casino game in which players may enter and exit on pure whim." *Investors Thrift v. Lam (In re Lam),* 192 F.3d 1309, 1311 (9th Cir. 1999). The Bank has forfeited its right to challenge value of the collateral as determined by the bankruptcy court.

IV

For the reasons stated herein, we affirm the judgment of the district court in its entirety.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: IKECHUKWU MACDONALD ENEWALLY, UZOAMAKA B. ENEWALLY Debtors.	District Court Case No. SA CV 02-459-GLT
WASHINGTON MUTUAL BANK, Appellant, vs. IKECHUKWU MACDONALD ENEWALLY, UZOAMAKA B. ENEWALLY Appellees.	Bankruptcy Case No. LA 00-35828 SB Adversary No. LA 00-02742 SB RULING ON APPEAL

Appeal from the Bankruptcy Court, Central District of California. REVERSED in part.

(Filed Nov. 26, 2002)

I. BACKGROUND

Appellant Washington Mutual Bank appeals an order of the United States Bankruptcy Court granting summary judgment in favor of Appellees Ikechukwu M. Enewally and Uzoamaka B. Enewally.

In its order the Bankruptcy Court (1) valued Appellees' Andy Street property in Long Beach at $210,000; (2) bifurcated Appellant's claim of approximately $240,000 in

the Andy Street property into a secured claim of $210,000 and an unsecured claim for the remaining balance; (3) provided for Appellees' payment of the secured portion at the original contractual monthly payment amount, at the contractual interest rate, over approximately fourteen years; (4) provided for payment of 17% of the unsecured portion under Appellees' Chapter 13 Plan; and (5) provided for the discharge of the unsecured balance upon completion of Appellees' Chapter 13 plan.

Appellant contends the Bankruptcy Court erred in allowing the payment of the secured claim over a term in excess of five years and in determining the value of the Andy Street property.[1]

II. DISCUSSION

The bankruptcy court's ruling on summary judgment is reviewed de novo on appeal. *In re Feiler*, 218 F.3d 948, 951 (9th Cir. 2000). Conclusions of law are reviewed de novo and factual findings for clear error. *In re Bankruptcy Estate of Markair, Inc.*, 2002 WL 31356215 (9th Cir. 2002).

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[1] Appellees contend Appellant's failure to appeal the Bankruptcy Court's July 27, 2001 confirmation of their Motion to Modify Chapter 13 Plan bars Appellant from appealing later orders based on the modified plan. The Bankruptcy Court's Confirmation Order granted Appellees Motion "on the condition the [Appellees] prevail in the two related adversary actions," one of which is the bifurcation summary judgment proceeding at issue in this appeal. Since the Bankruptcy Court's confirmation was conditional, Appellant's appeal from summary judgment is proper.

A. Payment Period

The parties do not dispute Appellant's claim is subject to bifurcation under 11 U.S.C. § 506 (a), which leaves Appellant with a secured claim equal to the value of the security interest, and an unsecured claim for the remainder. Appellant argues bifurcation of its claim pursuant to § 506 (a) is a per se "modification" of its rights under 11 U.S.C. § 1322 (b) (2).[2] While Appellant concedes its claim is subject to such modification, Appellant argues § 1322 (d) requires a Chapter 13 plan modifying its claim provide for Appellees to complete payment on the secured claim within five years.[3]

Appellees argue Appellant's claim was properly bifurcated or modified under § 1322 (b) (2), with payments to be "maintained" at the original contractual amount and interest rate under § 1322 (b) (5), which is not subject to the five-year payment term limitation of § 1132 (d).[4]

Appellees' contention is contrary to authorities, including those cited by the Bankruptcy Court in its

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[2] § 1322 (b) (2) provides a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."

[3] § 1322 (d) provides, "The plan may not provide for payment over a period that is longer than three years unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years."

[4] Under § 1322 (b) (5), a Chapter 13 plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."

opinion, holding a Chapter 13 debtor may not invoke both a modification of a claim under § 1322 (b) (2) and the right to cure and maintain under § 1322 (b) (5). *See* Bankr. Ct. Op. at 7 (Apr. 12, 2002) (citing *In re Hussain*, 250 B.R. 502, 507 (Bankr. D. N.J. 2000); *In re Pruett*, 178 B.R. 7, 9 (Bankr. N.D. Ala. 1995); *In re McGregor*, 172 B.R. 718, 721 (Bankr. D. Mass. 1994); *In re Scott*, 121 B.R. 605, 608-609 (Bankr. E.D. Okla. 1990).

The Bankruptcy Court characterized Appellees' plan as one invoking "§ 1322 (b) (5) and § 506 (a) to reduce the length of the mortgage, while maintaining the contractual monthly payments (and ordinarily the contractual interest rate) until the secured debt (but not the unsecured portion) is paid in full." *See* Bankr. Ct. Op. at 7.

The Bankruptcy Court appears to treat bifurcation under § 506 (a) as a process preceding or otherwise independent from changes to Appellant's claim under the Chapter 13 plan. This appears inconsistent with the Supreme Court's holding in *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993). In *Nobleman*, the Supreme Court considered and rejected debtors' argument that § 506 (a) operated automatically to adjust downward the amount of a lender's undersecured claim, and the resulting bifurcation was independent from the Chapter 13 plan. *See id.* at 328-329. The Court held bifurcation of an undersecured creditor's claim into secured and unsecured portions was a modification under § 1322 (b) (2), and was prohibited because the security interest was the debtors' principal residence.[5]

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[5] Appellees argue *Nobleman* is inapplicable because the Andy Street property is not their principal residence. The fact the Andy

(Continued on following page)

Since bifurcation of Appellant's claim is a § 1322 (b) (2) modification under *Nobleman*, and Appellees may not also invoke the right to cure and maintain under § 1322 (b) (5), the five-year term limitation of § 1322 (d) applies.

The Bankruptcy Court's order providing Appellees' with a payment term in excess of five years is REVERSED.

B. Valuation of the Andy Street Property

The Bankruptcy Court valued the Andy Street property at $210,000, based on Appellees' estimate of the value of the property included in their February 28, 2001, Separate Statement of Undisputed Facts and Conclusions of Law. The record provided by the parties shows Appellees' valuation was not contested by Appellant during the proceedings.

Appellant now contends the property was not valued at the appropriate time. Appellant argues § 1325 (a) (5) (B) requires a determination of the value of the Andy Street property near the time the Bankruptcy Court confirmed Appellees' plan in August 2001 rather than at the time of Appellees' February 2001 estimate. Appellant contends the value of the Andy Street property may have changed during the six-month period due to fluctuations in the real estate market.

Street property is not Appellees' principal residence does not change the *Nobleman* holding that the bifurcation is a § 1322 (b) (2) modification. Unlike in *Nobleman*, however, bifurcation is not prohibited by § 1322 (b) (2), a point Appellant concedes.

Appellant does not present evidence, however, showing the value of the Andy Street property had changed during that period or other evidence showing the Bankruptcy Court's valuation of the property at $210,000 was erroneous.

The Bankruptcy Court's uncontested valuation of the Andy Street property at $210,000 is AFFIRMED.

III. DISPOSITION

The Judgment of the Bankruptcy Court is REVERSED as to its order providing for Appellees' payment of Appellant's secured claim over a period in excess of five years, and AFFIRMED as to its valuation of the Andy Street property.

The matter is REMANDED to the Bankruptcy Court for further proceedings.

DATED: November 25, 2002

/s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES
DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: **Ikechukwu Enewally** **&** **Uzoamaka Enewally,** Debtors.	Case No. LA 00-35828 SB Chapter 7 Adv. No. LA 00-02742-SB **OPINION ON BIFURCATION OF CREDITOR'S UNDERSECURED CLAIM**
Ikechukwu Enewally et ux., Plaintiffs, vs. **Washington Mutual Bank, et al.** Defendants.	Date: September 20, 2001 Time: 10:00 a.m. Ctrm: 1575 (Filed Apr 12 2002)

I. INTRODUCTION

Debtors have brought this adversary proceeding to bifurcate the value of their income-producing property into secured and unsecured claims. Debtors propose to satisfy the secured claim under their chapter 13 plan[1] by making monthly payments of principal and interest in an amount consistent with the original loan agreement for a reduced period of time until the secured debt is paid in full. At the same time, debtors propose to satisfy the unsecured claim by paying 17% thereof through their chapter 13 plan.

[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (West 1999) and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

The court holds that debtors may bifurcate the under-secured claim into secured and unsecured claims. The court further holds that debtors may satisfy the secured claim by making the monthly payments of principal and interest provided by the original loan agreement during the life of the chapter 13 plan and during such further time as is necessary to pay in full the secured portion of the claim, plus interest thereon. The unsecured claim will be treated under the five-year chapter 13 plan.

II. RELEVANT FACTS

Chapter 13 debtors Ikechukwu M. Enewally and Uzoamaka B. Enewally are the owners of three pieces of real property, their residence in Norwalk and two income-producing properties in Long Beach. This litigation involves the Andy Street property in Long Beach, which is not now, and has never been, the debtors' residence. Washington Mutual Bank ("WAMU") holds a first mortgage on the property, for which the unpaid balance is $240,744.33.[2] At the time of filing, payments on the loan were current.

In this adversary proceeding the debtors seek four kinds of relief: (a) to value the property at $210,000 (to which the parties have stipulated); (b) to bifurcate WAMU's claim into secured and unsecured portions pursuant to § 506(a); (c) to require WAMU to credit all post-petition and post-discharge payments to the secured balance of the loan; and (d) to order that the unsecured

[2] The Andy Street property is also encumbered by a second mortgage in the amount of approximately $17,409.62. The debtors' chapter 13 plan treats this debt as unsecured.

portion of WAMU's loan will be subject to the discharge expected upon the completion of the debtors' chapter 13 plan.

The debtors' original chapter 13 plan, which was confirmed on November 20, 2000 made no mention of the debtors' intention to bifurcate the lien. The debtors have subsequently amended their plan to state their intention to make this bifurcation, which would give WAMU a secured claim in the amount of $210,000 and an unsecured claim for the remainder, $30,744.33. The plan as amended provides for the payment of 17% of unsecured claims.[3]

III. POSITIONS OF THE PARTIES

Debtors seek to bifurcate WAMU's claim into secured and unsecured claims in accordance with § 506(a). Debtors propose to pay the secured claim by maintaining the same monthly payments of the principal and interest, consistent with the original loan agreement. Debtors want to continue making those payments during the life of the plan and during such further time as is necessary to pay the secured claim in full. Debtors propose to treat WAMU's unsecured claim through their chapter 13 plan.

WAMU objects to the proposed treatment of its claim and contends that the plan impermissibly modifies its secured claim. WAMU argues that the debtors may only modify their obligation to WAMU if they pay the full

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[3] The percentage to be paid on unsecured claims remains unchanged under the plan as amended because, while the debtors did not disclose their intent to bifurcate WAMU's claim in their original plan, they included the unsecured portion of WAMU's claim in their original total of unsecured claims.

amount of the secured claim within the five-year period of the plan.

Debtors have brought a summary judgment motion on this issue. The court finds that there is no triable issue as to any material fact and that this adversary proceeding is ripe for summary judgment.

IV. DISCUSSION

A chapter 7 debtor is required to relinquish all of the debtor's non-exempt property for liquidation and distribution to creditors. In contrast, a chapter 13 debtor is permitted to keep all of the property, provided that (upon objection) the debtor pays all of the debtor's disposable income (after paying living expenses) to the chapter 13 trustee for a period of three to five years for distribution to creditors, and thus pay creditors at least as much as they would receive in a chapter 7 case. Under chapter 13, "individual debtors may obtain adjustment of their indebtedness through a flexible repayment plan approved by a bankruptcy court." *Nobelman v. American Savings Bank,* 508 U.S. 324, 327, 113 S. Ct. 2106, 2109, 124 L.Ed.2d 228 (1993).

A. Chapter 13 Treatment of Secured Creditors

A chapter 13 plan may treat a secured debt under two statutory alternatives. First, the plan may modify the rights of a holder of a secured claim pursuant to § 1322(b)(2). Second, the plan may cure any default and maintain payments on the secured claim pursuant to § 1322(b)(5). *See, e.g., In re Hussain,* 250 B.R. 502, 507 (Bankr. D. N.J. 2000); *In re Murphy,* 175 B.R. 134, 137

(Bankr. D. Mass. 1994); *In re Scott,* 121 B.R. 605, 608 (Bankr. E.D. Okla. 1990).

Each of these alternatives is subject to important limitations. In addition, the plan must meet the confirmation requirements of § 1325.

1. Modification of Secured Creditor Rights

Modification of the rights of a secured creditor is authorized by § 1322(b)(2), which provides that a chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ."[4]

The opportunities available under § 1322(b)(2) are subject to three limitations. First, the payments on the modified debt must be completed during the life of the plan, which is limited to three to five years. Second, the claim cannot be secured solely by real property that is the debtor's principal residence. Third, the plan must meet the confirmation requirements of § 1325.

a. Three to Five Year Maximum

A chapter 13 plan is limited to a duration of three to five years. Section 1322(d) provides:

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[4] Although not at issue in this case, the statutory exception does not apply to a debtor's principal residence if that residence is a mobile home. This is the impact of the "in real property" phrase in the statutory exception.

> The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

Under this provision, a standard chapter 13 plan provides for payments over three years.[5] *See In re Greer,* 60 B.R. 547, 55 (Bankr. C.D. Cal. 1986); *see also In re Villanueva,* 274 B.R. 836, ___, (9th Cir. BAP 2002) (holding that it is not bad faith for a debtor to propose a 36-month plan).

b. Debtor's Principal Residence

Congress wrote special protections into chapter 13 for a lender whose collateral is limited to a debtor's principal residence. This exception plays a very important role in many chapter 13 cases, because saving their homes is probably the most important reason that debtors file chapter 13 cases.

The United States Supreme Court interpreted the "principal residence" exception in § 1322(b)(2) in *Nobelman.* In that case the bank had loaned the debtors $68,250 for the purchase of their principal residence. Six years later, the debtors fell behind on their mortgage payments and filed a chapter 13 case. While the bank was then owed $71,335, the parties agreed that the residence was only worth $23,500 at the time of the bankruptcy filing. The debtors proposed to pay the secured portion of the loan by making monthly payments in accordance with the original

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[5] The "best efforts" requirements of § 1325(b) usually assure that the duration of a chapter 13 plan provide that it will be at least three years.

loan agreement until the $23,500 was paid in full (including interest and arrearages). The plan further proposed to treat the remainder of the bank's claim as unsecured, and to give it the same treatment as other unsecured creditors (who were to be paid nothing).

The Supreme Court held that § 1322(b)(2) prohibits such a modification where the lender's claim is secured only by a lien on the debtor's principal residence. *Nobelman,* 508 U.S. at 332. The Supreme Court held that the unmodifiable rights of the secured creditor under the statutory exception include the right to repayment of principal in monthly installments over a fixed term at specified rates of interest, the right to retain the lien until paid in full, the right to accelerate the loan upon default and proceed to foreclosure, and the right to bring an action for a deficiency.[6] *See id.* at 329.

To be sure, the debtors in this case propose to do precisely what the Supreme Court disallowed in *Nobelman* (except that here the debtors propose to pay 17% of the general unsecured claims). However, WAMU's reliance on *Nobelman* is misplaced: *Nobelman* applies only where the collateral is exclusively the debtor's principal residence. In this case, none of the collateral at issue is the debtors' principal residence.[7] Thus, the property is not protected by

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[6] Under California law, unlike the Texas law at issue in *Nobelman,* a foreclosing creditor rarely has a right to a deficiency. This arises from several statutory provisions, the most important of which is that a lien creditor that proceeds by non-judicial foreclosure (which is almost universal) waive any right to a deficiency. *See* Cal.Civ.Code §§ 2924-2924/(West 2001); *see generally* 4 HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE § 10:214 (3d ed.2000).

[7] Even where the collateral is partly the debtor's residence, the § 1322(b)(2) exception does not apply. *See, e.g., In re Murphy,* 175 B.R.

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the antimodification exception in § 1322(b)(2). Where the creditor's claim is not "secured only by a security interest in real property that is the debtor's principal residence," *Nobelman* does not apply.

2. "Cure and Maintain"

Further, *Nobelman* does not prevent a chapter 13 debtor from saving a principal residence under § 1322(b)(5). *See Rake v. Wade,* 508 U.S. 464, 467-75, 113 S. Ct. 2187, 124 L.Ed.2d 424 (1993). Section 1322(b)(5) provides that a chapter 13 plan may:

> notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

Under this statute, a debtor may "cure and maintain" a debt to a secured creditor on the debtor's principal residence. *See Rake,* 508 U.S. at 473 n.9; *accord, Nobelman,* 508 U.S. at 330 & n. 4. Under such a plan, the debtor makes plan payments to cure the deficiency (including interest at a suitable market rate). In addition, the debtor maintains the regular monthly mortgage payments under the original mortgage agreement during the life of the chapter 13 plan and thereafter until the mortgage is paid

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134 (Bankr.D.Mass.1994) (two duplexes, one unit of which the debtors occupied); *In re McGregor,* 172 B.R. 718, 720 (Bankr.D.Mass.1994) (four-unit apartment building, one of which the debtor occupied); *In re Legowski,* 167 B.R. 711, 714 (Bankr.D.Mass.1994) (duplex in which debtors occupied one unit).

in full (or the property is sold). *See Rake,* 508 U.S. at 473 n.9. The rate of interest on the payments is controlled by the mortgage documents. *See In re Bagne,* 219 B.R. 272, 275 (Bankr. E.D. Cal. 1998). The five-year limitation does not apply to a "cure and maintain" plan, because § 1322(b)(5) makes an explicit exception for such plan provisions. *See In re McGregor,* 172 B.R. 718, 721 (Bankr. D. Mass. 1994).

If a loan is not in default, no cure is needed under this provision. Nonetheless, a debtor may take advantage of this provision to maintain payments on a secured or unsecured claim on which the last payment is due after the final payment under the plan. Citing *Barnes v. Barnes* (*In re Barnes*), 32 F.3d 405 (9th Cir. 1994), WAMU argues that § 1322(b)(5) cannot be invoked by a debtor who has no arrearages to cure. However, *Barnes* held only that a debtor cannot rely on this provision when a debtor's chapter 13 plan *fails* to cure arrearages. *See id.* at 408.

WAMU also argues inaccurately that a chapter 13 plan relying on § 1322(b)(5) must leave a secured creditor's rights completely unmodified. The language of this provision lends no support for this argument: the statute requires only that the plan maintain the payments on the secured (or unsecured) claim.

To be sure, a "cure and maintain" plan modifies to a certain extent the rights of the creditor whose loan is secured by the debtor's principal residence. *See id.* However, § 1322(b)(5) authorizes this modification, because this provision applies "notwithstanding paragraph (2) of this subsection." Such a modification thus falls "outside § 1322(b)(2)'s prohibition." *Nobelman,* 508 U.S. at 330.

3. Chapter 13 Plan Confirmation Requirements

Section 1325 requires the court to confirm a chapter 13 plan if it meets the requirements stated in that section. Each of these requirements must be satisfied before confirmation. *Barnes,* 32 F.3d at 407.

The provision relevant both to this case and to *Barnes* is § 1325(a)(5), which limits the extent of the permissible modification of a creditor's rights. This provision imposes the following obligation on a chapter 13 plan:

> with respect to each allowed secured claim provided for by the plan –
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is no less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder . . . .

As in *Barnes,* neither (A) nor (C) applies in this case, because WAMU has not accepted the plan and the debtors do not propose to surrender the property. Thus the debtors must satisfy the requirements of subsection (B).

In *Barnes* the debtors proposed to bifurcate the claim of the undersecured creditor into a $43,000 secured claim and a $26,000 unsecured claim. Debtors proposed to amortize the secured claim with a reduced monthly

payment over the 19-year remaining life of the original loan at 10% interest. The debtors conceded that they did not satisfy § 1325(a)(5)(B)(ii), and argued that the plan could be confirmed notwithstanding this deficiency. The Ninth Circuit found that compliance with § 1325(a)(5)(B) was mandatory and reversed the plan confirmation order.

As in *Barnes,* the third requirement of subsection (B) does not apply, and the first requirement is clearly satisfied: debtors propose that WAMU retain its lien securing its secured claim.

However, this case is different from *Barnes* with respect to compliance with § 1325(a)(5)(B)(ii). The court finds that the debtors in this case do meet this requirement. Thus *Barnes* does not stand in the way of confirmation of the amended chapter 13 plan in this case.

For the purposes of § 1325(a)(5)(B)(ii), the allowed amount of a secured claim is governed by § 506(a), which limits it to the value of the collateral. The allowed amount of WAMU's secured claim in this case is $210,000, the stipulated value of the property. In consequence, § 1325(a)(5)(B) requires that the "property to be distributed under the plan on account of [this] claim" must be no less than $210,000 in value.

The property that the amended plan in substance distributes to WAMU is an obligation to make payments, the present value of which is $210,000. This present value is guaranteed by a first mortgage in the real property at issue.

Of course, the debtors are not promising to pay WAMU $210,000 immediately. They propose to pay this amount in monthly payments at the mortgage payment

rate under the original agreement. The value of these payments must be discounted to present value to determine the value of the note today. *See Rake v. Wade,* 508 U.S. 464, 472 n.8, 113 S.Ct. 2187, 2192 n.8, 124 L.Ed.2d 424 (1993); 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 111.1 (3d ed. 2000). As the Supreme Court explains:

> When a claim is paid off pursuant to a stream of future payments, a creditor receives the "present value" of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments. This generally involves a determination of an appropriate discount rate and a discounting of the stream of deferred payments back to the present dollar value of the claim at confirmation.

Id.

To compensate for the delay in payment, debtors propose to pay WAMU interest. If the interest rate equals or exceeds the appropriate discount rate, the value of the stream of payments is equal to or exceeds the value of WAMU's secured claim. In this case debtors propose to pay WAMU interest at the contract rate. Absent evidence to the contrary, the court presumes that this rate matches the appropriate discount rate for determining the present value of the obligation. *See GMAC v. Jones,* 999 F.2d 63, 70-71 (3d Cir.1993).[8] Thus the value of the payment

[8] There has been a substantial amount of litigation resulting in many reported decisions on the appropriate discount rate for determining present value under § 1325(a)(5)(B)(ii). *See* LUNDIN, § 112.1 and cases cited therein. The amount at issue rarely merits litigating this

(Continued on following page)

obligation equals the value of WAMU's secured claim, and the requirements of § 1325(a)(5)(B)(ii) are met.

B. Modification of Undersecured Claims

1. Section 506(a)

As a general rule, a bankruptcy debtor can require a lienholder to accept the present value of the property in full satisfaction of a lien, even where the total debt exceeds the value of the property. 2 LUNDIN § 105.1. This rule applies to chapter 13 debtors, unless the lender is secured only with real property that is the debtor's principal residence.

This rule is based on § 506(a), which provides the basic treatment of an undersecured creditor in a bankruptcy case. Section 506(a) divides an undersecured claim into two claims, a secured claim equal to the value of the collateral and an unsecured claim for the overage. Section 506(a) states in relevant part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditors interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

See Rake v. Wade, 508 U.S. 464, 468, 113 S.Ct. 2187, 2190, 124 L.Ed.2d 424 (1993) (applying § 506(a) to an

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issue in a chapter 13 case. The parties in this case have wisely skirted this swamp.

oversecured home mortgage lender in a chapter 13 case); *Nobelman,* 508 U.S. at 327-28. Thus in this case WAMU has a secured claim for $210,000 (the stipulated value of the real estate) and an unsecured claim for $30,744.33.

Where a claim is secured solely by real property that is the debtor's principal residence, *Nobelman* gives no role to the § 506(a) bifurcation. However, case law provides otherwise where the security is not solely the debtor's principal residence. *See, e.g., Hammond v. Commonwealth Mortgage Corp. (In re Hammond),* 27 F.3d 52 (3d Cir.1994) (permitting bifurcation of undersecured creditor's claim where it was secured by personal property as well as the debtor's personal residence); *In re Pruett,* 178 B.R. 7 (Bankr. N.D. Ala. 1995); *In re Murphy,* 175 B.R. 134, 137 (Bankr. D. Mass. 1994); *In re McGregor,* 172 B.R. 718, 721 (Bankr. D. Mass. 1994).

2. Modes of Bifurcation

Chapter 13 debtors seeking to modify the rights of an undersecured creditor have generally adopted one of two strategies, both of which rely on § 506(a). Under both strategies debtors have sought to pay the reduced secured claim in full, and to pay the unsecured claim only to the same extent as other unsecured creditors are paid under the plan.

The first strategy is to reduce the amount of the monthly payments on the secured claim and to make reduced payments, at the original interest rate, on the secured debt over the life of the original loan (or the duration of the plan, if longer). The second strategy is to reduce the length of the loan, and to maintain the payments at the original amount (with the original interest

rate) for a shorter period of time until the secured portion of the loan is paid in full.

a. Reduced Payments

The first strategy is limited by the five-year maximum for a chapter 13 plan. *Barnes v. Barnes (In re Barnes),* 32 F.3d 405, 407-08 (9th Cir. 1994) The statutory authority for the first strategy is based on § 1322(b)(2) and § 506(a). Thus the five-year maximum provided in § 1322(c) applies, and the secured claim as modified must be paid during the life of the plan (which may not exceed five years).[9]

Case law makes it clear that a secured claim may not be modified under § 1322(b)(2) by reducing the size of the monthly payment for the duration of the original loan agreement (if the original duration exceeds the length of the plan). If the chapter 13 debtor proposes to reduce the monthly payments to the secured creditor, the loan must be paid in full over the life of the plan (which may not exceed five years). *See, e.g., Barnes; In re Hussain,* 250 B.R. 502, 507 (Bankr. D. N.J. 2000); *In re Pruett,* 178 B.R. 7 (Bankr. N.D. Ala. 1995); *In re Murphy,* 175 B.R. 134, 137 (Bankr. D. Mass. 1994); *McGregor,* 172 B.R. at 721; *In re Ramirez,* 62 B.R. 668, 670 (Bankr. S.D. Cal. 1986).

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[9] In fact, in some cases the duration of the chapter 13 plan exceeds the contractual life of the debt. This is particularly true where the debt has a balloon payment, which may come due before the bankruptcy case is filed or during the chapter 13 plan. In these circumstances, the chapter 13 plan may extend the life of the loan to repay it during the life of the chapter 13 plan. *See, e.g., In re Bagne,* 219 B.R. 272, 276-77 (Bankr. E.D. Cal. 1998).

In consequence, a chapter 13 debtor may not invoke both a modification of a secured creditor's claim under § 1322(b)(2) and the right to "cure and maintain" over the life of the original loan as authorized under § 1322(b)(5). *See, e.g., Hussain,* 250 B.R. at 507; *Pruett,* 178 B.R. at 9; *McGregor,* 172 B.R. at 721; *Ramirez,* at 670; *In re Scott,* 121 B.R. 605, 608-09 (Bankr. E.D. Okla. 1990). This consequence arises because, as discussed *supra,* paragraph (5) states that it applies "notwithstanding paragraph (2) of this subsection." If Congress had said that paragraph (5) of the subsection applied "in addition to" paragraph (2), the law would be otherwise.

Chapter 13 debtors sometimes have the income to pay a mortgage, especially a junior mortgage which may be relatively small, over the life of a plan. However, in most case they do not have sufficient income, and this strategy is not available.

b. Full Payments for Reduced Time Period

The second typical strategy to deal with an undersecured creditor that is not secured by the debtor's principal residence is to invoke § 1322(b)(5) and § 506(a) to reduce the length of the mortgage, while maintaining the contractual monthly payments (and ordinarily the contractual interest rate) until the secured debt (but not the unsecured portion) is paid in full. As in the first strategy, the unsecured debt is treated with other unsecured debts under the chapter 13 plan and is typically paid in part (and sometimes not at all).

This strategy is explained by Chief Judge Queenan in *dicta* in *McGregor*:

> The Debtor may nevertheless take advantage of 1322(b)(5) by keeping the same . . . contract rate and making the same payments of principal and interest called for by the note during the life of the plan and during such further period of time as is necessary to have the total principal payments equal the amount of the secured claim as valued by this court. There would then be "maintenance of payments." And those payments would be maintained on the "secured claim" as that claim is computed in accordance with section 506(a). The three to five year limitation on plan payments of section 1322(c) would then have no application because section 1322(b)(5) permits payments lasting longer than five years. It speaks of maintenance of payments on a claim "on which the last payment is due after the date on which the final payment under the plan is due."

Id. at 721; *accord, In re Pruett,* 178 B.R. 7, 9 (Bankr. N.D. Ala. 1995).

Unlike the first strategy, this strategy is not limited by the 5-year limit on the length of a chapter 13 plan. This strategy relies on § 1322(b)(5), which explicitly permits a "cure and maintain" plan provision to apply to a debt whose final payment comes due after the final payment under the plan.

In this case, the debtors propose to use this second strategy. They propose to continue to make exactly the same monthly mortgage payments to WAMU as are provided in the original agreement (at the original interest rate) until the secured debt is paid in full. The debtors only propose to shorten the term of the loan to reflect the reduction in the secured claim under § 506(a). Because the

property at issue is not the debtors' principal residence, this does not violate § 1322(b)(2).

There appears to be no published opinion where the court has approved a debtor's proposal to adopt this strategy. However, in a number of reported opinions where the debtor has proposed the first strategy, the court has rejected the proposal but opined that the debtor could adopt this second strategy instead. *See, e.g., Pruett,* 178 B.R. at 9; *In re Murphy,* 175 B.R. 134, 137 (Bankr. D. Mass. 1994) (quoting KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 4.49 (1994)); *McGregor,* 172 B.R. at 719-21. However, none of the debtors in those cases had proposed to adopt the second strategy.

The court finds that the debtors are entitled to use § 1322(b)(5) to maintain the monthly payments on their secured claim at the original contractual amount until the secured claim is paid in full. The court further finds that the size of the secured claim is governed by § 506(a), and is limited to the value of the collateral, which in this case is $210,000.[10] When the debtors' payments reach this amount, plus accrued interest at the contractual rate and any other applicable charges, the loan will be paid in full (provided that the debtors complete their chapter 13 plan and obtain a discharge).

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[10] The court finds no apparent statutory reason why this analysis should not also apply to a debt secured by a debtor's principal residence. Section 1322(b)(5) provides that it applies "notwithstanding paragraph (2) of this subsection," which contains the exception for a debtor's principal residence. However, such a construction is not permitted by *Nobelman.* After quoting the relevant language in paragraph (5), the Supreme Court in *Nobelman* stated enigmatically, "These statutory limitations on the lender's rights ... are independent of the debtor's plan or otherwise outside § 1322(b)(2)'s prohibition." *Id.* at 330.

V. CONCLUSION

The court concludes that the debtors may confirm a chapter 13 plan that bifurcates their secured debt, which is not secured by their principal residence, under § 506(a) and make the monthly payments of principal and interest at the original contract rate until the reduced secured claim is paid in full.

Pursuant to the first amended plan and this adversary proceeding, the secured debt is reduced to the property's fair market value of $210,000. Debtors are required to make monthly payments to WAMU pursuant to the chapter 13 plan in the same amount as they were obligated to make prepetition under the original loan agreement. This payment obligation will extend for the life of the chapter 13 plan and such further time as is necessary to pay the § 210,000 secured claim in full. When debtors have completed payments on this debt, plus interest at the contract rate the mortgage will be paid in full, on condition that the debtors receive their chapter 13 discharge.

The unsecured claim of $ 30,744.33 is given the same treatment as the other unsecured debts in the chapter 13 plan: the debtors shall pay 17% pursuant to the provisions of the plan, and WAMU's unsecured claim will be discharged with the discharge following the successful completion of the chapter 13 plan.

Dated: April 12, 2002

/s/ [Illegible]
Samuel L. Bufford
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I certify that a true copy of this OPINION ON BIFURCATION OF CREDITOR'S UNDERSECURED CLAIM was mailed on APR 12, 2002 to the parties listed below:

Ms. Nancy Curry
Chapter 13 Trustee's Office
606 So. Olive St., Ste. 1850
Los Angeles, CA 90014

Stephen M. Taylor, Esq.
Law Offices of Stephen M. Taylor
5305 East 2nd Street, Ste. 203
Long Beach, CA 90803-5339

Fred Timothy Winters, Esq.
The Wolf Firm
A Law Corporation
18 Corporate Plaza Drive
Newport Beach, CA 92660-7901

Hal Marzell, Esq.
Michael J. Friedman, Esq.
9200 Oakdale Avenue
Chatsworth, CA 91311

DATED: APR 12, 2002 /s/ Elaine L. Garcia
Deputy Clerk

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re IKECHUKWU MACDONALD ENEWALLY, UZOAMAKA B. ENEWALLY, Debtor.	Case No. LA 00-35828 SB Chapter 13 Adversary No. 00-27423 **JUDGMENT**
IKECHUKWU MACDONALD ENEWALLY, UZOAMAKA B. ENEWALLY, Plaintiff, v. WASHINGTON MUTUAL BANK, FA; HANANEL PERAHIA, NANCY JANE PERAHIA, DAVID PERAHIA, ALEXANDER J. MOULINOS, Defendants.	(Filed Apr. 19, 2002)

The Court having granted Plaintiffs' Motion for Summary Judgment and Default Judgment, Judgment is hereby awarded Plaintiffs, IKECHUKWU MACDONALD ENEWALLY and UZOAMAKA B. ENEWALLY, against WASHINGTON MUTUAL BANK, FA, HANANEL PERAHIA, NANCY JANE PERAHIA, DAVID PERAHIA, and ALEXANDER J. MOULINES, as follows:

1. The certain real property commonly known as 3380 Andy Street, Long Beach, California (hereafter the "Real Property"), and legally described as

LOT 16 OF TRACT 28449, IN THE CITY OF LONG BEACH, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 724, PAGE(S) 39 THROUGH 40, INCLUSIVE, OF MAPS IN THE OFFICE OF THE COUNTY RECORDED OF SAID COUNTY

has a fair market value of $210,000.00; and,

2. Based on the Court's evaluation of existing liens versus the value of the Real Property, the mortgage loan currently held by Defendant Washington Mutual Bank which is secured by the certain Deed of Trust dated August 28, 1989 and recorded in Official Records of Los Angeles County on September 12, 1989 as Instrument number 89-1463076 is secured in the amount of $210,000.00 and unsecured for any remaining balance; and,

3. Any Proof of Claim filed by Washington Mutual in this case relating to the Andy Street loan shall classify its claim as secured in the amount of $210,000.00 and unsecured for any remaining balance; and,

4. Washington Mutual is further ordered to adjust its loan amortization schedules to credit any and all post-petition payments to the secured balance as determined hereinabove [plus interest at the contract rate /s/ SB] with the unsecured balance being paid through Debtors' Chapter 13 Plan; and,

5. The mortgage loan currently held by Defendants, HANANEL PERAHIA, NANCY JANE PERAHIA, DAVID PERAHIA, and ALEXANDER J. MOULINOS (hereafter "Perahia-Moulinos") which is secured by the certain Deed of Trust dated September 5, 1989 and recorded in Official Records of Los Angeles County on September 12, 1989 as

Instrument number 89-1463077 (the "Perahia-Moulinos Deed of Trust") is entirely unsecured; and,

6. Any Proof of Claim filed by Perahia-Moulinos in this case relating to the Andy Street loan shall classify its claim as unsecured and shall be so treated in Debtors' Chapter 13 Plan; and,

7. Upon successful completion of Debtor/Plaintiffs' Chapter 13 case and issuance of a discharge thereon, Plaintiff shall be permitted to record in Official Records of Los Angeles County a certified copy of the judgment in this case and the discharge order, which shall have the combined effect of reconveying and forever releasing the Perahia-Moulinos Deed of Trust identified above, pursuant to 11 U.S.C. § 506(d).

Dated: 4/19/02

/s/ Samuel L. Bufford
HON. SAMUEL L. BUFFORD
UNITED STATES
BANKRUPTCY JUDGE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 5305 East 2nd St., Suite 203, Long Beach, California 90803-5339.

On March 2, 2001, I served the foregoing document described as

JUDGEMENT

on all interested parties in this action by placing for collection and mailing on the above date, following ordinary business practices, a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

* * * PER ATTACHED MAILING LIST * * *

[✓] (By Mail) I am readily familiar with my employer's practice for collection and processing of correspondence and pleadings for mailing with the United States Postal Service. Under that practice, correspondence and pleadings are collected daily and deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Long Beach, California in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing set forth in this affidavit.

[✓] (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 2, 2001, at Long Beach, California.

/s/ Coby R. Halavais
Coby R. Halavais

Master Mailing List
Enewally/LA 00-35828 SB/ Adv. No. 00-2742

FRED TIMOTHY WINTERS, ESQ.
THE WOLF FIRM
18 CORPORATE PLAZA DRIVE
NEWPORT BEACH, CALIFORNIA 92660
[Attorneys for Defendant, Washington Mutual Bank]

HANANEL PERAHIA
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

NANCY JANE PERAHIA
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

DAVID PERAHIA
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

ALEXANDER J. MOULINOS
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

STEPHEN M. TAYLOR, ESQ.
LAW OFFICES OF STEPHEN M. TAYLOR
5305 E. 2nd ST., SUITE 203
LONG BEACH, CALIFORNIA 90803-5339
[Debtor/Plaintiffs' counsel]

NANCY K. CURRY
CHAPTER 13 TRUSTEE
606 S. OLIVE ST., STE 1850
LOS ANGELES, CA 90014

NOTE TO USERS OF THIS FORM:
Physically attach this form as the last page of the proposed Order of Judgment.
*Do **not** file this form as a separate document.*

In re ENEWALLY, IZECHUKWU ENEWALLY, UZOAMAKA **Debtor**	**Chapter** 13 **CASE NUMBER:** LA 00-35828 SB

NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING

TO ALL PARTIES IN INTEREST ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1(1)(a)(v), that a judgment or order entitled (*specify*):

   JUDGMENT

   was entered on (*specify date*): Apr. 19, 2002

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on (specify date): Apr. 22, 2002

Dated: Apr. 22, 2002

JON D. CERETTO
Clerk of the Bankruptcy Court

By: /s/ C. Jeanmaril
Deputy Clerk

Notice of Entry/Master Mailing List
Enewally/LA 00-35828 SB/Adv. No. 00-2742

FRED TIMOTHY WINTERS, ESQ.
THE WOLF FIRM
18 CORPORATE PLAZA DRIVE
NEWPORT BEACH, CALIFORNIA 92660
[Attorneys for Defendant, Washington Mutual Bank]

HANANEL PERAHIA
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

NANCY JANE PERAHIA
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

DAVID PERAHIA
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

ALEXANDER J. MOULINOS
6416 BARMANTE CIRCLE
RANCHO PALOS VERDES, CALIFORNIA 90274
[Defendant]

STEPHEN M. TAYLOR, ESQ.
LAW OFFICES OF STEPHEN M. TAYLOR
5305 E. 2nd ST., SUITE 203
LONG BEACH, CALIFORNIA 90803-5339
[Debtor, Plaintiffs' counsel]

NANCY K. CURRY
CHAPTER 13 TRUSTEE
606 S. OLIVE ST., STE 1850
LOS ANGELES, CA 90014

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: IKECHUKWU MACDONALD ENEWALLY; In re: UZOAMAKA B. ENEWALLY, Debtors. - - - - - - - - - - - - IKECHUKWU MACDONALD ENEWALLY; UZOAMAKA B. ENEWALLY, Appellants, v. WASHINGTON MUTUAL BANK, Appellee.	No. 02-57119 D.C. No. CV-02-00459-GLT **ORDER** (Filed Jul. 1, 2004)
In re: UZOAMAKA B. ENEWALLY, Debtor. - - - - - - - - - - - - WASHINGTON MUTUAL BANK, Petitioner-Appellant, IKECHUKWU MAC-DONALD ENEWALLY, Respondent-Appellee, v.	No. 02-57151 D.C. No. CV-02-00459-GLT

UZOAMAKA B. ENEWALLY,

Respondent-Appellee,

and,

IZECHUKWU MAC-DONALD ENEWALLY,

Debtor.

Before: CANBY, RYMER, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and Thomas voted to reject the suggestion for rehearing en banc and Judge Canby so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.